IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Tenth Circuit in action #7796 entered on April 26, 1965. The opinion appears in the appendix to this petition. That judgment reversed a judgment in favor of the plaintiff (petitioner here) on a jury verdict obtained in the United States District Court for the District of Colorado.

BASIS OF JURISDICTION

Jurisdiction of the Supreme Court is invoked under Title 28, United States Code, Sec. 1254(1). Review is sought from judgment of the Court of Appeals of the Tenth Circuit in action #7796 entered on April 26, 1965 but as yet unreported.

QUESTION PRESENTED

Do Rules 50(d) and 38(a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for new trial and for judgment notwithstanding the verdict and entered judgment for the plaintiff?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

Rule 50(d) Federal Rules of Civil Procedure, effective July 1, 1963, provides as follows:

> If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment nothwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 38(a) Federal Rules of Civil Procedure, provides as follows:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as

given by a statute of the United States shall be preserved to the parties inviolate.

Seventh Amendment to the United States Constitution provides as follows:

> Jury trial in civil action.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

STATEMENT

The minor plaintiff, acting through her legal representative, brought an action for damages for the wrongful death of her father while he was working as an engineer in the erection of a missile launching silo in Colorado. Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000 exclusive of costs and interests as provided by Title 28, United States Code, Sec. 1332.

The plaintiff claimed that her father died as a direct result of a fall from a certain wooden scaffold or platform and that his fall was the proximate result of the negligence of the defendant in the erection, maintenance and supervision of that scaffold or platform. A federal jury awarded her the sum of $25,000 damages, this being the maximum award permissible under Colorado's wrongful death statute. The defendant filed a motion for judgment notwithstanding the verdict in accordance with a motion for directed verdict previously made, and, in the alternative, the defendant moved for a new trial. The trial court denied both motions and entered judgment on the verdict in favor of the plaintiff (petitioner here). The defendant (respondent here) appealed to the Court of Appeals which reversed the action with instructions to the trial court to dismiss.

ARGUMENT

This is a matter of first impression. Research by petitioner's attorneys fails to reveal a single instance wherein the new Rule 50(d) has been interpreted.

The Court of Appeals exceeded its statutory and constitutional powers by ordering this action dismissed. If the Court of Appeals was right in its conclusion that neither negligence nor proximate cause were present, then that Court had certain powers which it could employ: It could (1) reverse with instructions to order a new trial, or (2) it could reverse with instructions to the trial court to determine whether or not a new trial should be granted.

The petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence. But the thrust of this argument is that once the jury has returned its verdict and the trial court (in this case the Honorable Alfred A. Arraj, presiding judge of the United States District Court for the District of Colorado) has denied the motions for new trial and judgment notwithstanding the verdict, then the appellate court is without power to substitute its interpretation of the facts for the interpretation of the jury.

It will be observed that the entire opinion of the Court of Appeals consists of an interpretation, from the cold transcript, of the facts developed at the trial. When the Court of Appeals concludes from its recital of the evidence that "There is no evidence of the cause of Neely's fall" the Court is doing exactly what the Constitution of the United States forbids: It is re-examining in a way repugnant to the common law, facts tried to a jury in a civil action at common law where the value in controversy exceeds twenty dollars.

The trial judge and the jury were present during the entire trial of this action. They were in a far better position than was the appellate court to observe the witnesses as

they testified and to appraise at first hand the evidence as it was presented. The petitioner believes that Rule 50(d), so recently enacted, was an attempt by the Supreme Court to delineate for the Courts of Appeals what they could and could not do in the precise situation which exists in this controversy. At the very least, the appellate court must give to the trial court the final decision as to whether or not the originally successful party should be given another chance to prove his case.

CONCLUSION

Litigants and lower courts throughout the United States must be told the extent to which verdicts are protected or jeopardized by the newly enacted Rule 50(d). The petitioner therefore respectfully prays that her petition for a writ of certiorari be granted and for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of July, 1965, I served a copy of the foregoing petition on John C. Mott, Esq., McComb, Zarlengo & Mott, attorneys for respondent, by mailing a copy in a duly addressed envelope with proper postage prepaid, to John C. Mott, Esq., McComb, Zarlengo & Mott, attorneys at law, American National Bank Building, 17th and Stout Streets, Denver, Colorado, 80202.

Charles A. Friedman